IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE DISTRICT OF COLUMBIA, *Plaintiff in Error*,
vs.
ELIZABETH L. W. BAILEY, *Administratrix of Davis W. Bailey, Deceased.* — No. 390.

ELIZABETH L. W. BAILEY, *Administratrix of Davis W. Bailey, Deceased, Plaintiff in Error*,
vs.
THE DISTRICT OF COLUMBIA. — No. 420.

Brief for Elizabeth L. W. Bailey, Administratrix, Defendant in Error in Case No. 390 and Plaintiff in Error in Case No. 420.

STATEMENT OF THE CASE.

In 1883 Davis W. Bailey began an action at law against the District of Columbia (No. 24279), in the supreme court of the District, for $25,000 damages, for alleged breach of a contract for laying asphalt pavements in Washington (Record, 1). [All the references in this brief to the printed record relate to the folios or side paging.] This declaration, by consent of counsel for the District, was subsequently amended so as to include a claim for extra work done under the contract

(23, 26, 28). This amended declaration and the defendant's pleas were missing at the time of the trial below, but no objection was made on either side to the parol proof of their contents, and a replication to the pleas was filed, which of itself sufficiently indicates the substance of the defense (2, 3). However, what the pleas were became immaterial, as will be seen further on.

In 1885 the death of the plaintiff was suggested, and his widow, Elizabeth L. W. Bailey, as his administratrix, was made plaintiff in his place (3). On the 16th of September, 1891, the action being then still pending, the plaintiff's attorney, Mr. Williamson, wrote a letter to the Commissioners of the District of Columbia, in which he asked them to "appoint some good man as referee or arbitrator, to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case" (20). On the 11th of January, 1892, the Commissioners appointed J. J. Johnson (a member of the bar of the supreme court of the District) "referee in the matter of the suit of Bailey, administratrix of Bailey, deceased, *versus* District of Columbia" (21). The parties, by their counsel and with their witnesses, appeared before the referee thus appointed, and, after hearing all the evidence submitted by either side and listening to the arguments of the respective counsel, Mr. Johnson made a written award, by which he found that there was due to the plaintiff $10,519.20, besides costs (30, 31). He prefaced his award with a report of the case, which report was entitled "In the supreme court of the District of Columbia. Davis W. Bailey *vs.* The District of Columbia" (27). He filed the report in court in that case July 18, 1892 (27). The award stated separately the amounts found due under the original declaration and under the claim for extra work in the amended declaration (30, 31). All the objections to the award made at the trial went to the award as a whole.

The plaintiff's counsel on the 12th of September, 1892, and again on March 10, 1893, moved the court to enter judgment on the award (35, 36). On the 23d of September, 1892, the attorney for the District filed exceptions to the award on the ground that it was "contrary to the evidence" and "excessive," because "the evidence was insufficient to support the award," and because "of plain and palpable errors apparent on the face of the award" (35). These exceptions, by consent of the plaintiff's attorney, were filed after the time allowed by the rules of court (35).

At this point in the case it was found that the parties differed as to what the agreement between them was in reference to the effect to be given to Mr. Johnson's award. The plaintiff's counsel insisted that the award was to be final. The attorney for the District (Mr. Thomas), who, after the award was filed, had succeeded Mr. Hazelton, who, as such attorney, had agreed to the submission, contended that the real understanding had been that Mr. Johnson was to make a report, which should be submitted to the court for review. As no order of court had been made referring the case to Mr. Johnson, and as an order could not be entered *nunc pro tunc* on account of this difference between the parties as to its terms, the plaintiff proceeded to bring a new action upon the award against the District. In her declaration in the second suit, which was filed August 8, 1893, she set up the pendency of the original action, the agreement to refer to arbitration, the award in her favor, notice to the District, and failure of the District to pay (8). This second action was numbered 34564. To the second declaration the defendant filed a number of pleas, the substance of which was that there had been no agreement to arbitrate (13, 14). To these pleas a general replication was filed (15).

Upon motion of plaintiff's counsel, the two actions were then consolidated (16). They were tried before Mr. Justice McComas and a jury. The court, when the evidence was concluded, directed the jury to find a verdict for the defend-

ant in the original action (42) and submitted the second case to the jury, leaving it to determine, upon the evidence, whether or not the agreement under which the case was submitted to Mr. Johnson was an agreement to arbitrate or a qualified submission, as was contended by the attorneys for the District (41–48). The jury found a verdict for the plaintiff for the amount claimed, with interest from the date of the filing of the award (16). A judgment having been entered in each case in pursuance of the respective verdicts, each of the parties appealed to the Court of Appeals of the District of Columbia. That Court affirmed both the judgments (80–84. See 9 Ap. Cas. D. C., 360). Each of the parties thereupon brought the case to this Court by writ of error.

During the trial the defendant's counsel took a number of exceptions to the rulings of the court, which were embodied in seven separate bills of exceptions (22, 23, 25, 26, 31, 43, 48). One of these bills, the sixth, by inadvertence was not signed by the presiding justice (43). In it are contained all the exceptions which were taken to the instructions to the jury given or refused by the court at the trial. The seventh bill of exceptions (47, 48) refers to the exceptions "to such parts of said charge as are contained within brackets." No parts of the charge are included in brackets.

The plaintiff duly excepted to the instruction given by the court to the jury in the first case, to render a verdict in that case for the defendant, and her exception was incorporated in the seventh bill of exceptions, which was duly signed (42, 48).

In this Court, as in the Court of Appeals, the administratrix is satisfied to have both the judgments below affirmed, and asks that this be done without costs as against her. She appealed to the Court of Appeals, and now brings the case here on writ of error, solely in order that if the judgment in her favor in the second suit should be set aside, the court below may be directed to enter judgment in her favor

in the first action, or to take such other steps therein as justice may require. She is forced, for her own protection, to a cross-appeal in a case in which she has no complaint to make of the action of the courts below.

ASSIGNMENTS OF ERROR IN CASE NO. 420.

The court below erred:

1. In affirming the judgment of the trial court in the original action No. 24279 in the supreme court of the District of Columbia.

2. In not holding that the trial court erred in instructing the jury in said case No. 24279 to find a verdict for the defendant.

3. In not remanding that case to the court below with instructions to set aside the judgment in favor of the defendant and to enter a judgment in favor of the plaintiff in the sum of $10,519.20, with interest from July 18, 1892, and costs.

ARGUMENT.

I.

There was no error in consolidating the two cases.

It is perfectly apparent that this was the only way in which justice could be done to both parties in the cases. The order was one which was within the discretion of the trial court. The unreasonableness of this objection on the part of the District is well stated by Mr. Justice Morris in delivering the opinion of the Court of Appeals (82).

II.

As to the admission of oral testimony to show the agreement between the parties.

It seems to be the contention of the counsel for the District that the written order of the Commissioners appointing Mr. Johnson referee (21) was in response to Mr. Williamson's letter of September 16, 1891 (19), and that these two writings constitute a complete contract between the parties. To this contention we reply:

1. That if this be true, no harm was done to the appellant by the admission of the oral evidence, because the proposition made in the letter was that the Commissioners should "appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award *which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case*" (20). The only question of fact seriously controverted at the trial was whether the parties referred the

case to Johnson as an arbitrator, whose decision was to be final, or as a referee, whose finding was to be reviewed by the court.

2. The order appointing Mr. Johnson referee is not addressed to Mrs. Bailey or her attorney. It does not refer to Mr. Williamson's letter. Without oral testimony to connect it with the letter, no connection is shown between them. The order is dated nearly four months after the letter was written. Both sides conceded that between the two dates they were engaged in a verbal negotiation as to a submission. Clearly, therefore, it is a case in which a part only of the contract was in writing. That being so, of course the whole matter was open to oral evidence to show what was the real agreement between the parties. (See Hays *vs.* Hays, 23 Wend., 263.)

III.

It was not error to allow the appellee to offer in evidence the award upon which she sued without compelling her to offer in evidence at the same time the papers appended to the award purporting to contain the testimony of Francis D. Bailey on behalf of the plaintiff in the action, and a copy of a letter of Francis V. Greene dated March 10, 1883, put in evidence before Mr. Johnson on behalf of the District.

1. These papers are not referred to in the report, or made part thereof in any way. This alone is fatal to the objection.

2. Before the award was offered in evidence, it had been shown by Mr. Johnson's uncontradicted testimony that these papers were not filed as a part of the report because all the testimony was not there; that the papers from the office of

the District Commissioners which had been before him were not filed in court, but were returned to the office of the Commissioners; that the report was of only a part of the testimony; and that the testimony was not read over to the witnesses, but was simply taken for his guidance (27).

3. It was not competent to submit to the jury the evidence upon which the award was made. It was left to the jury to say whether the parties did agree to accept Mr. Johnson's award as final, and that inquiry is closed by the verdict. The evidence cannot be looked at to see whether the arbitrator properly decided questions of fact. It must be presumed that there was evidence to sustain the award. On this point it is unnecessary to look further than the case in this Court cited in the brief for the appellant—U. S. *vs.* Farragut, 22 Wall., 415, 416, 422, 424.

IV.

As to the alleged exclusion of the "evidence" attached to the award.

1. What has been said above meets this assignment of error. The evidence, so called, was no part of the report, and if it had been, neither the court nor the jury could inquire into it to see whether the arbitrator had made a mistake.

2. But these papers were not excluded. They were not offered in evidence at all (33). It will be seen that no objection was made by Mrs. Bailey's counsel when the counsel for the District in case 34564 offered in evidence "the record and proceedings" in case 24279. Nor did the court in any way interfere. It is not pretended that the counsel for the District made any attempt to acquaint either the court or the jury with the contents of the papers in ques-

tion. What really happened was, that when the counsel came to prepare their bill of exceptions, a question arose as to whether, as a matter of fact, their offer of the report included these papers. The judge who presided at the trial and heard and saw what took place held that they had not been offered in evidence; and in his certificate which accompanies the bill of exceptions, but which is not a part of it, he states—what the bill of exceptions itself shows—that these papers were not read to the jury. They were, therefore, not offered in evidence, and there was no exclusion of them, and this assignment fails on that account.

3. If the bill of exceptions omitted anything that the counsel for the District conceived themselves entitled to have inserted in it, their remedy, upon the refusal of the court below to comply with their demand, was by *mandamus*. The novel course actually pursued—obtaining from the presiding justice a certificate explaining why he excluded the papers in question from the bill of exceptions—cannot avail them here.

4. And even if the so-called evidence was a part of the award, and was contained in the bill of exceptions as such, it would amount to nothing, even on the theory of appellant's counsel that it was for the court to review any supposed errors of law committed by the referee which are apparent on the face of the award. Counsel for the District have carefully refrained in their brief from pointing out any such supposed apparent error of law. The award of Mr. Johnson will be read in vain—either in connection with the supposed evidence or without it—in the search for errors of law, obvious or otherwise.

5. And of what avail is it to look at a part of the evidence to find out whether the arbitrator made a mistake, either of law or of fact? All presumptions are in favor of the award.

The arbitrator testifies, and nobody disputes, that only a part of the evidence was filed with the report. The very contract out of which the claim arose is missing from the so-called evidence. How could the trial court determine that the arbitrator had made a mistake without knowing what were the terms of the contract under consideration?

V.

There was no error in admitting the report or award of Mr. Johnson in evidence.

On examination of the Record (31) it will be seen that when the award was offered in evidence by plaintiff's counsel the objection that was made to its introduction was based upon two grounds and no other—first, that the so-called evidence should have been offered with the award, and, second, that "said referee was without authority to make an award."

The first objection has been already considered. The second was bad because it was too general. The fifth assignment of error—the only one relating to this exception—is itself too general to be valid.

In the brief the particular objections to the authority of the arbitrator are for the first time set forth. They are not such objections as can fairly be considered within the scope either of the objection made to the admission of the award in evidence (31) or of any of the assignments of error. They are:

(*a.*) The award lacks the element of mutuality.

(*b.*) The plaintiff, as administratrix, had no authority to submit the claim to arbitration.

(*c.*) The Commissioners had no authority to submit the controversy to arbitration.

The objection of want of mutuality seems to be based entirely upon the other two propositions.

An administrator has power to submit a claim, and especially one that is already in litigation, to arbitration.

3 Williams on Executors, bottom page 1801, note *i*.
2 Woerner's Am. Law of Administration, sec. 327.
Lyle *vs.* Rogers, 5 Wheaton, 406.
Morse on Arbitration and Award, 19, and cases cited.

The Illinois case upon which counsel rely is based wholly upon an Illinois statute.

The Commissioners of the District are also authorized to submit to arbitration a claim against the municipality which they represent, especially when an action is pending to enforce the claim.

1 Dillon, Mun. Corp., sec. 478 (and see cases cited in the opinion of the Court of Appeals, 82).

As to the hypercritical objection about the award being in favor of the "plaintiff," the Court will remember that this suit was originally brought by Davis W. Bailey in his lifetime; that Mrs. Bailey, as administratrix of her husband, was duly made party in his stead after his death (3); that in Mr. Williamson's letter to the Commissioners offering to arbitrate the case he refers to it as "the case of Davis W. Bailey *vs.* District of Columbia, No. 24279, at law" (19); and that in the order of the Commissioners appointing Mr. Johnson referee, the case is described as "in the matter of Bailey, administratrix of Davis W. Bailey, deceased, *versus* The District of Columbia" (21).

Under this head counsel for the District next proceed to contend that even if the report be considered as an award, Mr. Johnson "having disclosed the grounds of his findings, the court has authority to inquire into the correctness of those findings."

If this proposition be good law, as stated, it would be

worth while to inquire what an arbitration is good for in any instance.

The counsel proceed to cite cases at some length in support of their contention. It will be found upon examination of these authorities that they do not go to the length claimed, and that almost without exception they are cases in which there had been a reference by order of court. It will be noted that in this case it is established by the verdict of the jury that this was an arbitration, and that the parties did not intend when they entered into their agreement that the court should have authority to review the findings of the arbitrator. This distinction turns against the District every authority of any consequence upon which its counsel rely. Thus in Belmont *vs.* W. & G. R. Co., 3 Mackey, 357, the court, after resting its decision upon the fact that the parties had expressly agreed that the award should be subject to the approval of the court, says:

"We can only consider this order as authorizing the referee to report the case to the court for its judgment and as in the nature of a special verdict or an agreed statement of facts. * * *

"Now it may be that the attorneys intended to make a reference to arbitration. We know very well what the effect of an award of arbitrators is, that it is final and conclusive upon all the facts in the case, and the controversy cannot be inquired into either by the parties or by the court. The duty of the court is a merely formal act then, or nearly so, to enter judgment upon the award, and that makes an award of an arbitrator a practical determination of a controversy. The only way in which the award of arbitrators can be impeached, according to the act of Maryland, is on the ground of fraud, malpractice, or where notice has not been served upon the parties, etc., and if a party desires to file exceptions it must be done with proof of this description in order to impeach it; otherwise the order must stand, and this appears to be the result of our own rules upon the subject."

In cases of a common-law arbitration the rule is that laid down by this Court in Burchell *vs.* March, 17 How., 349. In that case a bill in equity had been filed to set aside an award, and the Court say:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators after a full and fair hearing of the parties, a court of equity will not set it aside for error *either in law or in fact.* A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."

See also—

Smith *vs.* Morse, 9 Wall., 82.

Morse on Arbitration and Award, chap. X, 291 to 338.

"Courts of justice in their latest decisions have manifested a disposition to treat awards with more liberality than formerly. Everything is to be intended in favor of an award."

Caton *vs.* McTavish, 10 G. & J., 192.

This has ever since been the rule in Maryland. See—

Ebert *vs.* Ebert, 5 Md., 359.

Roloson *vs.* Carson, 8 Md., 220 to 222.

Garitee *vs.* Carter, 16 Md., 309.

Maryland, etc., R. R. Co. *vs.* Porter, 19 Md., 458.

Willard *vs.* Hersey, 22 Md., 89.

VI.

There was no error in granting the plaintiff's first prayer (41).

What has been said under the second assignment of error applies to this point.

VII.

The court did not err in refusing to instruct the jury to find a verdict for the defendant.

It might reasonably have been expected that the appellant's counsel would have pointed out some supposed mistake of law on the part of the arbitrator, since his alleged errors of law have been one of the excuses set up by the District for not abiding by his award, but counsel content themselves with informing the Court that Colonel Greene testified one way as to certain facts in the case, and that Francis D. Bailey, the plaintiff's son, gave testimony in favor of her contention. The only fault that is found with the award in the opposing brief is that it was against the evidence. But, under the general law of arbitration the Court cannot look at the evidence, and in this case only a small part of the evidence was filed by the arbitrator and the trial court refused to incorporate that part (48 to 78) in the bill of exceptions because it had not been offered in evidence at the trial (78). If the Court looks at the meagre part of the evidence before the referee contained in this record (48 to 78), it will find that as to the damages claimed for violation of the contract there was evidence on both sides, and that as to the claim for extra work all the evidence was on the side of the plaintiff.

Having nothing better to urge against the award, the appellant's brief closes with the suggestion that the course pursued by Mrs. Bailey's counsel in endeavoring to enforce the award is properly stigmatized as "jugglery with judicial proceedings."

On this subject all we have to say is that we will be greatly obliged if the counsel for the District at the argument of this case will point out any method other than the one pursued by which the question whether the parties sub-

mitted the case to Mr. Johnson as an arbitrator and agreed to accept his award as final, or intended that he should make a report to the court for its action thereon, could be determined by a court and jury.

As to the decision of the Court of Appeals when the case was first before it, it will be seen that it then stood upon a motion for judgment for want of a sufficient affidavit of defense. Of course, then, all the statements of the affidavit were to be taken as true. One of those statements was that "the alleged reference of said cause to the said Johnson, as we are informed and believe, was for the purpose of ascertaining and reporting to the court the facts in said case to be reviewed by the court as the basis for its judgment, and was never, as we are informed and believe, referred to the said Johnson, as arbitrator, by order of court or consent of the parties, nor did the said Johnson make or profess to make any award in the said cause" (15). The opinion of the Court of Appeals was put upon the ground "that the referee, as well as the parties to the action, understood that the award should be returned to and filed in that cause for final judgment" (4 Ap. Cas., 366–'7); and the court then also laid stress upon the fact that it was a suit against a municipal corporation, and those in charge of the affairs of the corporation at the time the suit was brought might know little or nothing of the special facts of the transaction.

But upon the evidence disclosed in the record now it is apparent that it was impracticable to enforce the award in the original case. A dispute arose between the parties as to whether the matter was submitted to Mr. Johnson as a common-law arbitrator or with the purpose of having him make a report which should be reviewed by the court. There were no pleadings in the original case upon which that question could have been decided, and counsel have failed to suggest any way in which there could have been engrafted upon it any such pleadings. The parties were

entitled to a trial by jury of the question which had thus arisen between them, and the simplest, if not the only, way in which that question could have been put in process of adjudication by a court and jury was by bringing an action upon the award.

CONCLUSION.

It will be seen that the position taken by the attorneys for the District of Columbia in this case is technical to the last degree. On the merits there was in fact but one question in controversy between the parties, and that was the question of fact, which the jury settled in the plaintiff's favor, whether the submission of the case to Mr. Johnson was absolute, as contended by the plaintiff, or qualified, as contended by the defendant.

Even if we assume that the counsel for the District are right in claiming that the court should have disposed in the original action of the questions in suit, the result would be the same. The exceptions filed by the District to the report or award all went to the sufficiency of the evidence to sustain the findings of the arbitrator, except the fourth and last exception, which was in general terms based upon "plain and palpable errors of law apparent on the face of the award" (4). The jury having found that the submission was absolute, the trial court, in determining whether it should grant the motion of the plaintiff's counsel to enter judgment on the award, could not consider the evidence, even if it had been all filed with the award; and as to errors of law, the exception was manifestly insufficient, because it mentioned no specific error. Even at the trial no attempt was made to point out any such specific error. Neither in the brief in the Court of Appeals nor in the brief here have counsel for the District suggested any error

of law, palpable or otherwise, apparent on the face of the award. Hence, if the judgment below in the action last brought should be set aside on the ground that the sufficiency of the award should have been determined in the first suit, it would follow that the judgment in the first suit should be set aside also, and the court below directed to enter a judgment in that case on the award for the amount thereof, with interest thereon from the date when the award was made.

Several cases are cited in the opposing brief in support of their proposition that the submission to arbitration of a pending action at law will not necessarily of itself work a discontinuance of the action. On the other hand, it has been frequently held that the effect of such reference is to discontinue the pending suit (Miller *vs.* Underhill, 1 John., 315; Johnson *vs.* Parmley, 17 John., 129; Camp *vs.* Root, 18 John., 22; Dodge *vs.* Waterbury, 8 Cowen, 136; Rathbone *vs.* Lownsbury, 2 Wend., 595; Town *vs.* Wilcox, 12 Wend., 503; Green *vs.* Patchin, 13 Wend., 293; Moore *vs.* Allen, 35 Maine, 276; Crooker *vs.* Buck, 41 Maine, 355; Eddings *vs.* Gillespie, 12 Heisk., 548; Jewel *vs.* Blankenship, 10 Yerg., 439; Muckey *vs.* Pierce, 3 Wis., 276; Cunningham *vs.* Craig, 53 Ill., 252). Frequently where such a reference has been made and acted upon, the court, upon motion of the successful party, has entered an order of reference *nunc pro tunc*. Much seems to depend upon the intention of the parties. When a question arises, after the arbitrator has made his award in pursuance of an oral agreement, as to what that agreement was, there is a practical difficulty in going on with the original suit which would seem to be insurmountable, unless both parties waive their right to a trial of that question by a jury and agree to submit it to the court.

In this case the parties stood on their rights, and a second action could not be avoided.

It is respectfully submitted that the judgment of the Court

of Appeals in both these cases should be affirmed; that if the judgment of that court in case No. 390 should be reversed its judgment in case No. 420 should also be reversed; that in that case the Court of Appeals should be instructed to remand the latter case to the supreme court of the District of Columbia, with instructions to enter judgment in that case on the award in the sum of $10,519.20, with interest from July 18, 1892, and costs.

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